IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 190 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DOLATSINH BHAVSINH RATHOD

Versus

STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 190 of 1992
MS SUBHADRA G PATEL for Petitioner No. 1 (absent)
Mr M A Bukhari, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 27/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

The appellant-accused has challenged in this appeal the judgment and order of conviction and sentence passed by the learned Addl.Sessions Judge, Nadiad on 4.2.1992 in Sessions Case No.23/90 convicting him for offences punishable under section 302 of IPC and sentencing him to suffer life imprisonment and to pay fine of Rs.500/- and in default to further undergo R.I. for 8 days.

2. This appeal is listed at Sr.No.4 in the running final hearing board of 26.11.2001. Mrs. Subhadra G Patel, learned Advocate was appointed in this matter to defend the appellant-accused. Yesterday we requested learned Addl.Public Prosecutor Mr M A Bukhari to request Mrs. Patel to remain present today before this Court at 11 a.m. sharp. But unfortunately, she did not remain present, therefore, in her absence, with the due aid and assistance of learned APP, Mr Bukhari, we have heard this matter.

3. It is an unfortunate case of sheer suspicion on the part of the appellant-accused, who is the husband of complainant Laxmiben, PW 1, Exh.9. They had already one son, Vikram. Second child Vijay was born three months before the incident. It is the prosecution case that the accused Dolatsinh Rathod was doubting the chastity of his wife regarding birth of his second child Vijay. On the date of the incident i.e. on 29.9.1989 in the early morning at about 5 a.m., when Laxmiben was sleeping outside her house with her two sons Vikram and Vijay, the accused came there and snatched away the second child Vijay and started running. She got up immediately and chased her husband and tried to save her child. But the accused threw the infant child Vijay, who was hardly three months old, in the well and ran away. On hearing her shouts, her real brother Arvindbhai, PW 2 Exh.13 and his wife Manjulaben, PW 6 Exh.25 came out from their house and they had also seen the accused throwing the child in the well and running away. FIR was lodged on the very day at about 12.15 p.m. before the police station. Police came and took out the dead body of the child and arrested the accused on the next day. He was put to the trial before the learned Judge for the offence punishable under section 302 of IPC.

4. The prosecution has examined Laxmiben, wife of the appellant-accused and mother of the deceased child-Vijay, PW 1 Exh.9. She has clearly stated in her evidence that the accused took away the child Vijay while

she was sleeping and when she chased him, he threw away the child in the well and ran away. Her evidence was duly corroborated on the point of throwing the child in the well by two witnesses Arvindbhai, PW 2 and his wife Manjulaben, PW 6. In addition to those two, there is an evidence of one independent witness Fatehsinh, PW 7 Exh.26. He had not actually seen the accused throwing away the child in the well but he had certainly stated that he had seen both, accused as well as Laxmiben near the well and the dead body of the child was found from the well. Dr.Devendra Sachdev, PW 3 Exh.15 has clearly corroborated the versions of the complainant and other eye witnesses. Considering their evidence, the learned Judge came to the conclusion that the prosecution has proved its case against the accused beyond reasonable doubt. Therefore, he convicted the accused for the offence punishable under Section 302 of IPC and sentenced him to suffer life imprisonment.

5. In absence of the learned Advocate for the appellant, we have carefully considered the evidence of all the three witnesses and we are fully satisfied that the learned Judge has not committed any error in convicting the accused relying upon their evidence. Nothing substantial has come out in the cross-examination of the complainant and eye witness Laxmiben. She was the mother of the child and she would never falsely implicate her husband because of the strained relationship. It is true that a suggestion was made to her in her cross-examination that near the well, there was a scuffle between them regarding the child and in that scuffle, the child slipped from the hands of the accused and fell into the well. But that suggestion was simply denied. If the accused had no such intention then being the father, he would try to save the child. Instead of that he ran away from the place of incident. Evidence of Laxmiben has been duly corroborated by material evidence given by her brother Arvindbhai and Manjulaben, wife of Arvindbhai. We are conscious that in this case all the three witnesses are closely related to the deceased child. But in this type of case, ordinarily closely related persons would be immediately available at the scene of offence which occurred at 5 a.m. If at all any independent witness is required, Fatehsinh was very much available, who had actually not seen the incident but he has established presence of the accused after the offence was committed.

6. In view of the above discussion, we are of the considered opinion that while convicting the accused for offence punishable under section 302, the learned Judge

has not committed any error which calls for interference by this Court.

7. In view of the above discussion, this appeal fails and is hereby dismissed.

27.11.2001 [B J Shethna, J.]

[D P Buch, J.]

msp